

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of LINDA L. HARPER and EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION, SAN FRANCISCO DISTRICT OFFICE, San Francisco, Calif.

*Docket No. 95-2856; Submitted on the Record;
Issued November 20, 1998*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established any continuing employment-related disability after August 22, 1993.

In the present case, the Office of Workers' Compensation Programs accepted that appellant sustained major depression as a result of compensable factors of her federal employment. Appellant stopped working in April 1981 and received compensation for temporary total disability. On June 18, 1993 the Office notified appellant that it proposed to terminate her compensation on the grounds that the medical evidence established that residuals of the employment injury had ceased. By decision dated August 9, 1993, the Office terminated appellant's compensation effective August 22, 1993. In a decision dated June 16, 1994, an Office hearing representative affirmed the August 9, 1993 termination decision. The hearing representative also found that additional evidence submitted by appellant was sufficient to create a conflict in the medical evidence as to whether appellant had a continuing employment-related psychiatric condition, and he remanded the case for further development. In a decision dated September 9, 1994, the Office determined that appellant did not have any continuing disability causally related to the accepted employment injury.

The Board has reviewed the record and finds that the case is not in posture for decision.

In the present case, the Office terminated appellant's compensation effective August 22, 1993. Although the Office has the burden of proof to terminate compensation, once it has met its burden, the burden shifts to appellant to establish continuing entitlement to compensation.¹ In this case, the Office referred appellant to Dr. David Isenman, a Board-certified psychiatrist serving as an impartial medical specialist. Before reviewing the medical

¹ *George Servetas*, 43 ECAB 424, 430 (1992). With regard to the termination of compensation, it is noted that appellant filed this appeal on August 15, 1995. The Board's jurisdiction is limited to one year from the date of the Office decision; *see* 20 C.F.R. § 501.3(d)(2). The only decision before the Board is dated September 9, 1994.

evidence, the Board notes that appellant submitted a letter dated July 26, 1994, requesting to participate in the selection of the impartial medical specialist. In a letter dated July 28, 1994, appellant asserted that she objected to being seen by the specialist selected because she had not been able to verify if there had been documented bias, unprofessional conduct, or a medical report obtained through telephone contact or as a result of leading questions.

The Board has recognized that, under the Office's procedures, a claimant is entitled to participate in the selection of an impartial medical specialist; however, the claimant does not possess an unqualified right to participate.² The Office will prepare a list of three specialists for selection by the claimant when (1) there is a specific request for participation and a valid reason for participation is provided, or when (2) there is a valid objection to the physician selected.³ The Office's procedures provide that documented bias or unprofessional conduct by the physician are examples of valid objections.⁴ In this case, however, appellant stated only that she had not been able to verify whether there was bias or unprofessional conduct. Appellant offered no probative evidence in support of a valid objection to the selected physician, and therefore the Board finds that the Office did not abuse its discretion in refusing to allow participation in this case.

In a report dated August 12, 1994, Dr. Isenman reviewed the medical evidence and provided a history and results on examination. With respect to the relevant issue, Dr. Isenman stated in pertinent part:

"The strength of the evidence is that [appellant] suffers from a personality disorder that preceded her employment at [the employing establishment] and continues to the present. Personality disorders tend to be lifelong problems until and unless they are adequately treated. The evidence in favor of the diagnosis of personality disorder is very strong.

"Symptoms of her work-related major depression appear to have resolved. Depression from her personality disorder continues. Even if at one time she suffered from a work-related major depression, that started in the late 1970's, there is little or no evidence to favor that explanation as a cause for any ongoing symptoms of anxiety or depression.

"It is much more reasonable to conclude that after all these years her current symptoms could best be explained by an Axis II diagnosis. The fact that she may need to continue with medications in no way supports any conclusions regarding etiology. If anything, she explains her depression in psychodynamic terms."

The Board finds that Dr. Isenman's report is not sufficient to resolve the conflict in the medical evidence. The hearing representative declared a conflict because attending psychiatrists

² *Joseph R. Boutot*, 45 ECAB 560 (1994).

³ *Id.*

⁴ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4 (March 1994).

Dr. William H. Hazle and Dr. George D. Karalis had submitted reports dated March 25 and March 29, 1994 supporting a continuing employment-related condition, while a second opinion referral physician, Dr. Javaid I. Sheikh, had submitted reports indicating that the employment injury had resolved prior to August 22, 1993. The conflict is therefore over whether appellant continued to have an employment-related disabling condition after August 22, 1993. Dr. Isenman does not directly address this issue. He states that symptoms of the employment-related depression appear to have resolved at the time of his examination in August 1994, without clearly indicating whether he believed the employment-related condition had resolved prior to August 22, 1993.

The Board finds Dr. Isenman's report to be imprecise and not sufficiently rationalized to resolve the conflict in medical evidence. The Office should seek a clarifying report from Dr. Isenman, or if he is unable to provide a report, a new impartial specialist should be selected.⁵ After such further development as the Office deems necessary, it should issue an appropriate decision.

The decision of the Office of Workers' Compensation Programs dated September 9, 1994 is set aside and the case remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.
November 20, 1998

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

⁵ See *Ramon K. Ferrin, Jr.*, 39 ECAB 736 (1988).